Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On Reply Brief

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PETITIONER'S REPLY BRIEF

Preliminary Statement

After the instant petition with the certified record on the proceedings in the Court of Appeals was filed in this Court on August 3, 1961, unexpectedly on August 7, 1961 an order was filed by the Court of Appeals denying a petition for rehearing *in banc*. This followed a prior order of June 21, 1961, simply denying a petition for hearing by the initial panel in which Judge Smith again recorded his dissent. The additional order of August 7, 1961, including a short memorandum by Judge Waterman, is reproduced on page 40a of respondent's addendum to its brief in opposition.

It is now apparent that the presently constituted bench of six circuit judges is evenly divided three to three on the major issue in the petition. Judges Clark, Waterman and Smith find no reversible error in the instruction by Ritter, *Ch. J.* on "railings or other safety devices" without expert

testimony. Judge Waterman would remand for other unexpressed reasons, and is the only one of the bench who has so affirmatively indicated. The other three, Judges Lumbard, Moore and Friendly denied the petition, to thereby affirm the 2 to 1 decision below.

POINT I

Intracircuit conflict and the finality expressed by the Court below to deny a seaman future maintenance demonstrate that certiorari jurisdiction is indicated.

The existence of such an intracircuit conflict has previously moved the Supreme Court to grant certiorari, thereby bringing about uniformity within the circuit. See: *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221; *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322. The purpose and intent of Rule 20 of the Rules of the Supreme Court would be properly served by granting certiorari to resolve this clear cut and significant incompatability. Mr. Justice Frankfurter's dissenting opinion in *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 530-531, 77 S. Ct. 443, quoted on page 5 of respondent's brief, actually favors petitioner in both respects where it states that certiorari jurisdiction is exercised on matters of general importance, "or in order to secure uniformity of decision."

The future trial and appellate status of petitioner's cause, as well as all other seamen's actions in the Second Circuit, is uncertain on the blanket proposition that "any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a Jury only if supported by expert testimony." This means any case involving ship or naval architecture now requires the testimony of an expert

on even a simple question of fact that is not complex or mechanical, well within the ken of a jury. A subsidiary question is whether an expert should be called by a plaintiff, or the shipowner whose responsibility it may be to show that something is not feasible.

Should petitioner's cause be remanded without a definitive holding by this learned Court, he and the trial Court can only guess whether or not an expert witness on this simple question of fact is required. Affirmance or reversal of either course must depend on which of the conflicting Circuit Court Judges would be in the next majority.

One of the other legal issues at stake, however, concerning future maintenance, is apparently treated with finality in the opinion below where it states ". . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (p. 8a of appendix to petitioner's brief). This is palpably contrary to all definitive rulings by this learned Court, and yet if undisturbed, must bind the trial Court in the instant case and adversely affect all seamen's cases grounded on this historic right. Respondent's silence on this in its brief is significant. Though this cause is meaninglessly remanded, yet its finality is apparent and therefore sufficient in itself to prompt a writ of certiorari. Respectfully, this is an issue of imperative importance within the intent and meaning of Rule 20.

The trial Court recorded its reasons for granting petitioner three years future maintenance, based not only on the medical testimony by petitioner's doctors and the admissions by medical experts called by respondent, but also on the dramatic findings in the ship's medical log that had been inexplicably withheld from medical analysis by respondent's Drs. Balensweig and Hyslop, and the voluminous records of the U. S. Public Health Service

Hospital constituting several years of treatment, and rehabilitation to the future. Though the humane and proper finding and conclusion on future maintenance were oral and concise, they nonetheless comply with Rule 52 F. R. C. P. where an exact form is not prescribed. (See p. 12 of petitioner's main brief.)

Not only does the majority opinion below demonstrate an adverse attitude to the traditional count for maintenance, it is part and parcel of a philosophy hostile to that reflected in the Jones Act (46 U. S. C. 688), and the related Federal Employers' Liability Act (45 U. S. C. 51 *et seq.*). See: *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740; *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457, and the other cases cited in petitioner's main brief. This is suggested as another persuasive ground for granting petitioner's prayer.

Where respondent states there is no conflict between the decision below and decisions of other Courts of Appeals, it apparently overlooks references in petitioner's main brief collated in the index of cases. Respondent's brief is silent on the more important conflict between the decision below and decisions of this learned Court that have consistently favored seamen as wards of the Court, entitled to a respected right to trial by jury.

POINT II

Respondent's unfair references to the record in the light of the jury's verdict in petitioner's favor, and the abuse it heaps on the eminently fair trial judge, must not cover the truth that a summary reversal by this Honorable Court would be fair and dispositive of issues of imperative public importance.

The futility of respondent's position explains and is matched by its abuse of the trial Judge. A unanimous jury on concededly substantial evidence found for petitioner, not the unfairly accused "petitioner-biased" trial Court. Respondent's brief is an example of desperate advocacy which attempts to distract from the overwhelming proof that favored petitioner and so found by the triers of facts, by again presenting its rejected version of its defenseless multiple breaches of the non-delegable obligations owed a young American seaman who was thereby rendered permanently and totally incapable of returning to a gainful occupation at sea. Respondent pursues the course it accuses by asking this learned Court to review evidence and facts, which it concedes on page 5 of its brief the Court of Appeals "has carefully ruled on." The jury's findings on conceded substantial evidence should have been binding on the Court below, and so by indirection respondent raises another point to justify review on the preemption of a Constitutional jury's fact-finding function in a seaman's case.

By reference to some of respondent's specious arguments it is readily apparent that a summary reversal is indicated on the proposition that there can be no doubt of the shipowner's breach of its high duty of care irrespective of due diligence or notice.

1. The record is replete with proof of the need for and absence of: a railing or "other safety devices", such as an ordinary rope line to grasp instead of the inadequate substitutes in the bulky radar cable enclosure or the thin metal stiffeners projecting from the sides of the tower; or skid-proof paint on the worn platform, as to which respondent had given false answers to interrogatories; or a simple flashlight to compensate for the long known inadequacy of the lighting in the radar tower. A railing or guard line would undoubtedly have afforded petitioner an immediate hand hold and also a guard to prevent his fall into the unprotected man-sized opening under the foreseeable dangers of a darkened radar tower, vibrating excessively in a pitching and rolling vessel proceeding at its record speed in a winter sea. Can a reasonable man deny there were conditions of "fairly obvious danger"?

2. Though attempted by respondent, can a crow's nest in an enclosed tower without any lights, compounded by long prior knowledge that the lighting therein was deficient, be compared favorably with outside crow's nests on other vessels? That there had been no prior accidents is some proof for the jury to accept or reject. Here it was rejected on the particular facts and circumstances involved in the accident—the condition of complete absence of illumination being a singular factor that respondent's witnesses conceded. On this obvious contributing cause that had never occurred before, but was chronic and so foreseeable for the cause on Jones Act negligence, and must prompt liability irrespective of notice on the cause for unseaworthiness, there should be no factual issue remaining for another jury.

3. Respondent concludes that the "granting of the petition could do no more than remand to the Court of Appeals

which would have to review the numerous other errors committed by the Trial Court." A study of respondent's brief discloses that a principal contention on "other errors", not even alluded to in the opinion below, is that the trial Court exercised its discretion to exclude a wooden mock-up model of a cut away portion of the radar tower, deceptive and confusing as to the actual conditions facing petitioner when he fell. It was no substitute for respondent's own photographs and diagrams that were actually admitted into evidence. Respondent also points to the number of rulings against it, to improperly argue they constituted "carelessly disguised prejudice against" respondent. Respondent fails to demonstrate that these vague "other errors" have any substance.

Regardless, the legal issues are of such importance and a definitive ruling by this learned Court is so imperative to resolve the intracircuit conflict, that the possibility of further proceedings on other matters before the Court of Appeals should not stay the granting of the petition, or in the alternative, a summary reversal on the ground that a disposition on "other errors" is meaningless with a record so clearly in favor of petitioner.

A case in point is *Palermo* v. *Luckenbach Steamship Co., Inc.*, 246 F. 2d 557, rev'd 355 U. S. 20, 78 S. Ct. 1. There another panel of the same Court of Appeals for the Second Circuit had reversed a judgment based on a jury verdict, on a purported failure to instruct, and other contended errors not considered in the opinion of reversal. This 2 to 1 reversal by the Court of Appeals, with a dissenting opinion by then Chief Judge Clark (who also dissents in the instant case), was summarily reversed by this learned Court. Thereafter the Court of Appeals at 253 F. 2d 724 rejected the shipowner's motion for additional argument on a reserved contention of error and reinstated the original judgment.

CONCLUSION

For the additional reason of a clear cut intracircuit conflict that will frustrate and prejudice any subsequent proceeding in this and all future trials on maritime causes, which can only be resolved by granting the petition for a writ of certiorari; and further, on an appreciation of the record as a whole that clearly and convincingly supports petitioner's contention that the conceded facts and findings justify a summary reversal and reinstatement of the original judgment based on the jury's verdict, and the trial Court's finding for future maintenance, petitioner respectfully prays that a writ of certiorari be granted and/or that this Honorable Court summarily reverse the Court below on both or either of the causes presented herein.

Respectfully submitted,

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